Alwiy v Siani Limited & 2 others (Civil Appeal 27 of 2016)
[2023] KECA 501 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 501 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL 27 OF 2016

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

MAY 12, 2023

BETWEEN

GHALIB AHMED ALWIY ..... APPELLANT

AND

SIANI LIMITED ..... 1ST RESPONDENT

NJEMA LIMITED ..... 2ND RESPONDENT

MARIE PAULELE PELLE ..... 3RD RESPONDENT

(Being an appeal from the judgement and decree made by the Environment and Land Court of Kenya at Malindi by the Hon Justice O.A. Angote on 19th February, 2016 in ELC Civil Case 49 of 2011 as consolidated with ELC Civil Case 149 of 2010)

JUDGMENT

1. This appeal arises from the judgement delivered on February 19, 2016 at Malindi in respect of ELC Civil Case No 49 of 2011 which was consolidated with ELC Civil Case No 149 of 2010. As a result of the said consolidation, the Learned Trial Judge treated the Respondents herein as the Plaintiffs while the Appellant together with the 2nd Defendant in ELC No 49 of 2011, Ernest John Hornhill, were treated as the Defendants.

2. By the Plaint dated May 3, 2011 as amended by the Amended Plaint dated July 11, 2011, the Respondents averred that the 1st Respondent, Siani Limited, is the registered owner of parcel of land known as Lamu/Block IV/113; that the Appellant constructed a temporary beach "banda" which he eventually turned into a permanent one without the Respondents' knowledge and that the Respondents later on agreed with the Appellant and paid him USD10,300 and a further Kshs 70,000 for the said beach "banda". Upon being paid, the Appellant moved out of the beach "banda" but on April 20, 2011, he returned to the property alleging that he was owed more money by the Respondents.

3. According to the Respondents, as a consequence of the said re- entry, the Respondents suffered loss amounting to Kshs 289,300.00. The Respondents' claim against the Appellant was therefore for a permanent and mandatory injunction directing the Appellant to vacate the suit property, together with special damages of Kshs 298,300.00. They also sought for mesne profits at the rate of Kshs 50,000.00 per month from the date of filing the suit until the date of Judgment.

4. The Appellant's case on the other hand was that in the year 2006, he held discussions with the Respondents on the sale of a beach house known as "Talking Trees" and verbally agreed that the 3rd Respondent would pay him USD 20,000 together with a road worthy Land Rover Motor Vehicle Registration Number KAN 104H valued at Kshs 750,000.00. According to the Appellant, the 3rd Respondent further agreed to pay him a monthly rent of Kshs 25,000.00 through her partner, Olivier, for a period of two years.

5. However, it was averred by the Appellant that when he went to pick the Land Rover, he found it to be un-roadworthy. The Appellant however maintained that he never sold the suit property to the 2nd Respondent and that the 3rd Respondent fraudulently prepared an agreement dated March 2007 and September 28, 2006 indicating that he had received a total of USD 20,000.00. He, in his claim in ELC No 149 of 2010, sought for declarations that he is the legal owner of the suit property and that the sale agreement that was entered into sometimes on September 28, 2006 and its subsequent verbal variation should be rescinded.

6. As regards the Respondents' claim in ELC Case No 49 of 2011, the Appellant averred in his Defence that the USD 10,300 that was paid to him was a part payment of the agreed sum of USD 20,000; that he had lived on the little plot next to the Respondents' suit premises and that the small plot had never been part of the Respondents' property.

7. In her evidence, the 3rd Respondent informed the court that her, together with the 2nd Respondent are directors in the 1st Respondent, Siani Limited, the registered proprietor of parcel of land known as Lamu/Block IV/113 on which a restaurant known as "Talking Tree" is situate. There is however a public road traversing the property hence the restaurant is on another side of the road. In support of this contention she produced the Certificate of Lease in respect of the said property. It was her evidence that when the 1st Respondent acquired the suit property, it was bushy and had makuti or temporary structures thereon and that the Appellant was one of the squatters on the suit property.

8. In the 3rd Respondent's evidence, she allowed the Appellant to continue occupying the structure on the suit property and later on allowed him to operate a banda without asking him for rent. Subsequently, she agreed to buy the Appellant's "banda" vide an agreement that was signed by the Appellant before an advocate, which he produced. Pursuant to the said agreement, the Appellant was paid USD 10,300 from the 3rd Respondent's Swiss Bank and the bank statement was produced in evidence. However, the Appellant approached her asking for further money and she gave him Kshs 70,000 together with a car. The agreement in respect to the second payment was also exhibited.

9. Later, the 3rd Respondent took over the premises and retained a contractor to repair the structure but was initially prevented from taking over the repaired structure by the Appellant. Instead, the Appellant rented out the structure to the said Earnest John Hornhill, at a monthly rent of Kshs 10,000.00. The said Earnest John Hornhill later on abandoned the premises and the 3rd Respondent found the place filthy with the structure that they had repaired having broken walls. Photographs taken by the valuer showing the status of the structure at different stages were exhibited. The 3rd Respondent lamented that the Appellant never allowed her in the premises but instead allowed his people to occupy the structure to her detriment.

10. Referring to the agreement of September 28, 2006 which referred to plot number 109, the 3rd Respondent clarified that the building was not on plot number 109; that the Appellant signed the agreement before an advocate in Lamu; that the agreement of April 25, 2007 is related to the first agreement; and that all the original agreements were stolen from her house by her workers.

11. When called as PW2, the Respondents' advocate informed the court that he witnessed the Appellant sign the second agreement at a hotel owned by the Appellant known as "Bush Gardens." According to PW2, the 3rd Respondent faxed him a copy of the agreement and he printed three copies which the Appellant signed in his presence. He disclosed that the copy of the agreement sent to him by the 3rd Respondent had already been signed by the Appellant, but the 3rd Respondent insisted that Appellant should sign the agreement again in PW2's presence. He produced the agreement as an exhibit.

12. PW3, the manager of Siani Farm, testified that Siani Farm had four parcels of land numbers 109, 110, 111, 112 and 113. In his evidence, plot number 113 abuts the sea and has the premises known as "Talking Trees". In the year 2010, the Appellant informed him that he wanted to take over "Talking Trees" but he refused. However, in April 2010, the Appellant forcefully took over the premises and leased it out to Earnest John Hornhill who in turn used it as a garage for boats. However, Earnest John Hornhill left the premises in the year 2011 and the Appellant leased the structures to school boys who vandalised it further.

13. PW4, the valuer informed the court that he was instructed to value the premises known as "Talking Trees", which is situated on plot number 113, by the 3rd Respondent. In his assessment, the initial physical damage to the suit premises was Kshs 302,080.00 while the monthly loss in terms of rentals was Kshs 50,000.00. In his opinion, the total damage that the Respondents suffered, including what was required to repair the premises, was Kshs 1,352,080.00 For his retainer, he charged the Respondents Kshs 130,000 to prepare the valuation reports. He exhibited the valuation reports as well as the receipts.

14. On his part, the Appellant informed the court that the 3rd Respondent acquired plot number 113 from the previous owner, Mr Marson, who was his neighbour, in the year 2005. After the said acquisition, the Appellant became a good friend of the 3rd Respondent because the 3rd Respondent used to visit his restaurants known as "Bush Gardens" and "Talking Trees". "Talking Tree" restaurant, according to the Appellant was built on a public beach, and though separate from Siani Farm, shared a fence with Siani Farm.

15. According to the Appellant, "Talking Trees" was initially a public beach which he applied to the Allocation Committee be allocated. Upon his application, the District Commissioner instructed the physical planner and the Town Clerk to visit the site and when the said visit was conducted, the physical planner, the Town Clerk and the Surveyor were informed by the said Marson family, that they did not object to the land being allocated to the Appellant.

16. It was the Appellant's evidence that since the disputed portion of land belonged to the then County Council of Lamu, by a letter dated September 9, 1996, which he exhibited, he was allowed to put up a structure thereon and for 13 years he ran his business thereon. Although the letter he was given by the Council referred to a building measuring 7.5 X 5 Meters, he explained that when the ocean receded, he put up a bigger building and was in the process of obtaining a title deed.

17. According to the Appellant though the Marson family never objected to his said occupation, upon her acquisition of the Siani Farm, the 3rd Respondent was not happy with his "banda" hence her agreement to buy the "banda" which she knew was the Appellant's property. The Appellant further testified that the 3rd Respondent agreed to fund his campaigns when he vied for the position of a Parliamentary seat; that the 3rd Respondent insisted that the Appellant sell to her the said beach property fronting Siani

Farm, undertaking to give the Appellant USD 20,000 for the said property. That offer was however not accepted by the Appellant whereupon the 3rd Respondent promised to give him a Land Rover Motor Vehicle in addition to the USD 20,000. All these agreements, according to the Appellant, were verbal.

18. The Appellant further testified that in September 2006, the 3rd Respondent wired to his account USD 10,000 but declined to pay him the difference. It was his case that when a Mr. Kala Madzu handed to him the Land Rover that the 3rd Respondent had promised to give him, he discovered that it was not as new as promised; that he did not believe that the Land Rover was worth Kshs 700,000 and that he declined to take the Land Rover because it did not have ownership documents and instead decided to park the Land Rover at his sister's place. The Appellant however, denied ever signing the agreement of March 2007.

19. In his judgement, the Learned Trial Judge found that Siani Limited, the 1st Respondent, was the registered proprietor of parcel of land known as Lamu/Block IV/113 which was acquired by the 2nd and 3rd Respondents as the new directors of the 1st Respondent, in the year 2005; that by the time the 2nd and 3rd Respondents acquired interests in Lamu/Block IV/113, the Appellant was in possession of a temporary banda which was later converted into a permanent structure known as "Talking Trees"; that although the Respondents claimed that the said structures were on the periphery of plot number 113, no evidence was called to prove that claim; that the Respondents should have called a surveyor to produce survey plans to show the extent of the boundaries of plot number 113 to enable the court ascertain if "Talking Trees" is within the boundaries of plot 113 or is on a public beach as alleged by the Appellant; that the documents produced by the Appellant tended to indicate that the plot that the Appellant applied for was outside the boundaries of plot number 113; that according to the letter dated 27th April 1993 by the then District Physical Planner, the Appellant was allowed to put up a temporary structure near Block II plot 12 and 13; and that structure was supposed to be of a temporary nature measuring strictly 7.5 M (long) X 5 M (wide) and was to be used as a watchman's shed and for shelter of surfing boats, and not for any other purpose.

20. The Learned Judge noted that the fact that the Appellant was directed not to inter alia encroach on the property rights of the immediate neighbouring plots including Siani Property Limited, the 1st Respondent, was indicative of the fact that the Appellant was only allowed to put up a temporary structure on the public beach and not on land belonging to the 1st Respondent and that is what must have happened even by the time the 3rd Respondent came into the picture in the year 2005. Accordingly, the initial structure or banda was constructed by the Appellant not within the boundaries of plot number 113 but on a public beach. However, whether the subsequent conversion of the structure into a permanent one encroached on plot number 113 could not be ascertained by the trial court for lack of evidence. Consequently, the trial court found that the Respondents and the Appellant failed to prove that "Talking Trees" Restaurant was within plot number 113.

21. Regarding the purchase by the Respondents of the structures known as "Talking Trees" from the Appellant, the Learned Judge found that there was evidence to show that on September 29, 2006, USD 10,350 was credited on the Appellant's bank account and that the Appellant produced his bank statement showing that he received the money on his account. That admission, coupled with the evidence of PW2 that the Appellant signed the handwritten agreement of March 2007 in his hotel known as "Bush Garden" in the presence of PW2 persuaded the Court to find that the Appellant agreed to sell to the 2nd and 3rd Respondents the structures known as "Talking Trees" Restaurant and he was paid the agreed sum. In addition to the agreed sum of USD 10,300, the 1st Defendant was also given a Land Rover by the 3rd Respondent for the purposes of his campaigns. Whether the said Land Rover was or was not roadworthy was not material because it was not part of the agreement of September

28, 2006 and March 2007 and in any event, the 1st Defendant never returned the Land Rover to the 3rd Respondent.

22. While finding that there was no evidence to support the Respondents' claim in respect of damage of the building, the Learned Judge found that the Respondents were entitled to mesne profits because having sold the suit property to the Respondents in the year 2006, the Appellant had no right to re-enter the suit property. Based on the unchallenged evidence of PW4, the Learned Judge granted the prayer for mesne profits at the rate of Kshs 50,000 per month from the date of filing of the Plaint until payment in full. He however declined to award to the Respondents special damages due to lack of proof.

23. In summary, the Appellant's suit was dismissed while the Respondents' suit was allowed by granting a permanent injunction restraining the Appellant and their employees, servants and or agents from entering, remaining and or taking possession of the beach banda known as "Talking Trees"; a mandatory injunction ordering the Appellant to forthwith vacate and handover the beach banda known as "Talking Trees" to the Plaintiffs; an order directing the Appellant to pay to the Respondents mesne profits at the rate of Kshs 50,000 per month from the date of filing of the suit until payment in full; and an order directing the Appellant to pay the Respondents the costs of the suit.

24. It was that decision that aggrieved the Appellant and provoked this appeal.

25. This appeal was heard on this Court's virtual platform on December 14, 2022. Learned Counsel, Mr E Kazungu appeared for the Appellant while Mr Tukero Ole Kina appeared for the Respondents. Counsel relied on their written submissions which they briefly highlighted before us.

26. According to the Appellant, the Learned Judge granted orders that were unenforceable and unpleaded and in support of this submission, the Appellant cited the case of *Galaxy Paints Limited v Falcon Guards Limited* Appeal Case Number 219 of 1998, the Ugandan case of *Libyan Arab Uganda Bank For Foreign Trade And Development & Anor v Adam Vassiliadis* (19861 UG CA 6, *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 Others* (20141 eKLR and *Joseph Mbuta Nziu v Kenya Orient Insurance Company Ltd* [20151 eKLR.

27. It was submitted that from the evidence adduced by the Respondents it was unclear who the purchaser was in the said sale as between the 2nd and the 3rd Respondents hence the Respondents failed to prove their case on a balance of probabilities in the first place. It was further submitted that though, in accordance with the agreement, the Appellant was to receive 1 year and 6 months' rent, he never received the rent nor did the Respondents provide evidence corroborating this position. An issue was further taken as regards the correct plot number in the agreement and whether the plot number was Plot No 113 or 109.

28. It was further submitted that the purported Agreements were not witnessed as stipulated by Section 3(3)(b) of the *Law of Contract Act* nor commissioned thus offends the law of contract. From the agreement, it was submitted, the 3rd Respondent never signed it; that there was no evidence that the original documents were lost; that no certificate of shares was produced as evidence to indeed show that the 2nd Respondent is a subsidiary of the 1st Respondent; that there were criminal proceedings in which the said Agreements were found inadmissible in evidence as the same were not certified or signed by the buyer hence there are now 2 conflicting decisions by courts of competent jurisdiction; that the learned trial Judge misdirected himself by relying and applying the principle of parole evidence rule; that the Learned Judge failed to find that the purchase price was never paid by the Respondents hence the Respondents failed to honour their part of the bargain and the said oral contract stood repudiated; and that the suit herein is bad in law as no evidence was adduced to prove that the 3rd Respondent was a Director of the 1st Respondent; that the suit was filed without due authority from the 1st and

2nd Respondents by way of Resolution of the company's members or its Board of Directors as to the institution of this suit or appointment of the Respondents' Advocates authorising them to file this suit.

29. It was submitted that the order of mesne profits awarded at the rate of Kshs 50,000 per month from the date of filing the suit until payment was issued unreasonably and unnecessary as the suit property belonged to the Appellant. According to the Appellant, mesne profits, as per Section 2 of the *Civil Procedure Act*, are what are due to be paid by a person who is a victim of wrongful occupation of his land by another and in this regard the Appellant relied on *Mistry Valii v Janendra Raichand & 2 others* [20161 eKLR. It was the Appellant's case that that even if the trial Court were to award mesne, it ought to have been Kshs 10,000/- as proved by the evidence given by the 3rd Respondent.

30. Were urged, based on the foregoing, to allow this appeal.

31. On behalf of the Respondents, it was submitted that plot No 113 and Lamu/block IV/113 are one and the same; that it is common ground that the 3rd Respondent was and is a Director of the 1st and 2nd Respondents and at all material times, the acts that the 3rd Respondent committed were therefore done on behalf of the companies; that the 2nd and 3rd respondents are directors and shareholders of the 1st Respondent; and that the issue was not raised in the pleadings; that it was not denied that the Appellant used the suit property as a bar.

32. We were urged to find that the appeal is bereft of merit and dismiss it with costs.

Analysis and determination

33. We have considered the issues raised in this appeal. This being the first appeal, this Court's mandate, as properly appreciated by the parties herein and as re-affirmed in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR.

34. The Appellant contends that the Learned Judge erred in arriving at a finding based on an unpleaded issue. The unpleaded issue referred to by the Appellant was that whereas the Plaint referred to Lamu/Block IV/113, the judgement was in respect of plot No 113. The case before the Learned Judge was not in respect of which parcel of land was owned by the 1st Respondent. The issues were whether the property claimed by the Appellant known as "Talking Trees" was part of the 1st Respondent's land; whether there was an agreement between the Appellant and the Respondents for the sale of the said "Talking Trees" to the Respondents; whether the Appellant breached the said agreement; and whether the Respondents were entitled to damages.

35. The Learned Trial Judge in his judgement found that there was no sufficient evidence adduced to prove that "Talking Trees" formed part of the 1st Respondent's land. From that decision, it was clear that the issue was determined in favour of the Appellant. In our view, it matters not the description of the 1st Respondent's land since the parties, from their evidence, were well aware of the land that the 1st Respondent owned and there was no dispute regarding its position vis-à-vis "Talking Trees". Accordingly, we find that nothing turns on this ground.

36. The Appellant has also raised the issue that there was no resolution made by the Directors of the 1st Respondent that authorised the filing of the suit. This issue, however, was not raised before the trial Court. It has been raised before us for the first time in this appeal. An appellate court deals with allegations of errors of omission or commission made by the trial court. Therefore, for an appellate court to determine an issue, that issue must have been placed before the trial court and a decision made thereon. An appellate court is therefore not the right forum to take up an issue for the first time when such an issue was not placed before the trial court for determination. The predecessor to this Court in *Alwi Abdulrehman Saggaf v Abed Ali Algeredi* [1961] EA 767 held that the course of taking a point

of law, which has not been argued in the court below, on appeal ought not to be followed unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea. The justification for that holding was that:

> " The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the judgements of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below."

37. In this case the issue of the company resolution ought to have been made an issue for trial before the trial court in order for the Respondents to have a chance to deal with it. We therefore cannot entertain it in this appeal.

38. As regards the contention that it was unclear who the purchaser was in the said sale as between the 2nd and the 3rd Respondents, the Respondents' case was that the 2nd and 3rd Respondents were directors of the 3rd Respondent who was the purchaser of the "Talking Trees". The purchase price was paid by the 3rd Respondent. The 1st Respondent being a corporation and legal person could only act through its alter egos, the Directors. Accordingly, there was nothing unusual for the negotiations and payments to have been made by the 3rd Respondent.

39. Regarding Section 3(3)(b) of the *Law of Contract Act*, the said Section requires that no suit shall be brought upon a contract for the disposition of an interest in land unless the signature of each party signing has been attested by a witness who is present when the contract was signed by such party. However, the section provides that:

> " sign", in relation to a contract, includes making one's mark or writing one's name or initial on the instrument as an indication that one intends to bind himself to the contents of the instrument.

40. In our view the intention of this provision is that the parties to an alleged contract unequivocally indicate that they intend to be bound to the contents of the instrument. This Court in *Panafrica Builders and Contractors Limited v Singh* [1984] KLR 121, held that the general rule is that a statute should not, in absence of express provision, be construed so that it deprives people of their accrued rights. In this case, the trial court found that the Appellant's signature was duly attested. To our mind it would be dishonest for the Appellant to urge us to find that since the 1st Respondent's signature was not attested, the contract was void when the 1st Respondent is not complaining about the issue.

41. As regards the earlier criminal proceedings, it was contended that there were no findings regarding the authenticity of the signature in those proceedings. The Appellant's position is, however, that the said proceedings having been determined in his favour the trial court ought not to have made a different finding. From the scanty material placed before us it would seem that the Appellant was acquitted under Section 210 of the *Criminal Procedure Code*, which applies to circumstances under which a *prima facie* case has not been established. We however have no material on the basis of which we can fault the Learned Trial Judge in entertaining the matter as the issue was only raised in cross-examination

and based thereon, we cannot state with certainty whose version between the Appellant's and the Respondents' is correct. Since it is the Appellant herein who seeks to impugn the decision of the Learned Trial Judge, the onus is upon him to satisfy us that the Learned Trial Judge's findings are incorrect which he has failed to do as regards this issue.

42. Regarding the clause in the agreement that the Appellant was to receive 1 year and 6 months' rent and whether the Respondents paid the same, there was no claim by the Appellant before the trial Court for this amount and we are unable to deal with it at this stage.

43. The Appellant has before us taken issue with the Learned Judge to finding that the purchase price was paid by the Respondents. This was a finding of fact and as this Court (Apaloo, JA, as he then was) in *Kiruga v Kiruga & Another* [1988] KLR 348, while dealing with what amounts to proof, cited *Watt vs Thomas* [1947] AC 484; *Peters v Sunday Post Ltd* [1958] EA 424 held:

> " An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the Judge can be said to be plainly wrong. It is a strong thing for an appellate court to differ, from the finding, on question of facts, of the Judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed the jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon evidence should stand. But this is jurisdiction, which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

44. This Court (per Hancox, JA, as he then was), in Mohammed *Mahmoud Jabane vs Highstone Butty Tongoi Olenja* [1986] KLR 661; [1986-1989] EA 183, held that:

> " The appellate Court only interferes with the trial Court's findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did."

45. We have re-evaluated the evidence that was adduced before the trial court as well as the judgement of the trial Judge. The Judgement was clearly based on the evidence as presented before the Court. It was not pointed to us and we are unable to find any factors which were either not taken into account or were inappropriately taken into account by the Learned Trial Judge. To the contrary, the Learned Trial Judge in a well reason decision considered all the issues that were placed before him and based thereon arrived at an informed decision. Accordingly, we find no reason to interfere based on this ground.

46. As regards the issue of mesne profits though the issue was pleaded by the Respondents in the amended plaint dated 11th July, 2011 and evidence led on it by PW4, it is our view and we hold that the trial court having found that the banda was not on the 1st Respondent's land but was on a beach plot, there was no basis for awarding mesne profits. We, accordingly, set aside the award of mesne profits.

47. Having considered the issues raised before us in this appeal, we allow the appeal as regards the award of mesne profits and set that award aside. Save for that we otherwise disallow the appeal.

48. We direct that each party bears own costs of this appeal.

49. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MAY 2023.

S. GATEMBU KAIRU, FCI Arb.

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JUDGE OF APPEAL

P. NYAMWEYA

…….……

JUDGE OF APPEAL

G. V. ODUNGA

…….……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR